

Hudson Oxygen Therapy Sales Company and Sales Drivers and Dairy Employees, Local Union 166, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.
Case 21-CA-20208

September 4, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND
ZIMMERMAN

Upon a charge filed on April 23, 1981, by Sales Drivers and Dairy Employees, Local Union 166, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, and duly served on Hudson Oxygen Therapy Sales Company, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 21, issued a complaint on May 5, 1981, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on March 18, 1981, following a Board election in Case 21-RC-16488,¹ the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate; and that, commencing on or about April 10, 1981, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On May 11, 1981, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On May 26, 1981, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on May 28, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent

thereafter filed a response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint and its response to the Notice To Show Cause, Respondent admits its refusal to bargain but challenges the Union's certification on the basis that the Board erred in overruling its objections to the election conducted in the underlying representation matter and certifying the Union as the exclusive bargaining representative of Respondent's employees. Respondent also argues that the Board erred in failing to grant Respondent a hearing on the objections. In the Motion for Summary Judgment, counsel for the General Counsel alleges that Respondent seeks to relitigate issues previously considered in the underlying representation case and, also, that no factual issues in the case warrant a hearing.

Our review of the record herein, including the record in Case 21-RC-16488, discloses, *inter alia*, that, pursuant to a Stipulation for Certification Upon Consent Election, an election was conducted among the employees in the stipulated unit on October 3, 1980, and that the tally of ballots furnished the parties after the election showed 361 votes cast for, and 173 against, the Union. There were five challenged ballots, an insufficient number to affect the results. Respondent filed timely objections which alleged that in the course of the campaign union representatives had threatened employees and security guards with bodily harm, that the Board agent had created an impression of partiality by allowing electioneering by union representatives at the polls, and that the Union had promised wage increases conditioned on a union vote to some non-English speaking employees. On December 23, 1980, the Acting Regional Director of Region 21 issued his Report on Objections in which he recommended that the objections be overruled and that the Board issue a Certification of Representative. On January 2, 1981, Respondent filed exceptions to the Regional Director's Report on Objections reiterating its arguments concerning election behavior and renewing its request for a hearing. On March 18, 1981, following consideration of the entire record in the case, the Board issued a Decision and Certification of Representative adopting the Regional Director's findings and recommendations and disavowing only the Regional Director's

¹ Official notice is taken of the record in the representation proceeding, Case 21-RC-16488, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), *enfd.* 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), *enfd.* 415 F.2d 26 (5th Cir. 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), *enfd.* 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLR Act, as amended.

conclusion that alleged threats were "not threatening," finding them merely insufficient to warrant setting aside the election.

On March 30, 1981, the Union, by letter, requested that Respondent recognize and bargain collectively with it. On April 10, 1981, Respondent, by letter, refused to recognize and bargain with the Union.

Respondent in its answer to the Notice To Show Cause admits that it refused to recognize and bargain with the Union and restates its arguments concerning the campaign raised in its objections to the election and in its exceptions to the Regional Director's Report on Objections. It contends, again, that a hearing should be conducted. Section 102.69 of the Board's Rules and Regulations states clearly that a party does not have an absolute right to a hearing on objections to an election.² It is only on a showing of substantial and material issues of fact concerning conduct sufficient to warrant setting aside an election that a party is entitled to a hearing. Respondent failed to make such a showing in the underlying representation proceeding and, by restating those same arguments in the unfair labor practice proceeding, it fails again. Thus, Respondent's claim that it is entitled to a hearing is without merit.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.³

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, a California corporation, is engaged in the manufacture of oxygen therapy equipment and operates a facility located at 27711 Diaz Street,

Temecula, California. In the normal course and conduct of its business operations, Respondent sells and ships goods and products valued in excess of \$50,000 directly to customers located outside the State of California.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

ii. the labor organization involved

Sales Drivers and Dairy Employees, Local Union 166, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

All production and maintenance employees including shipping and receiving employees, duplicators, inspectors, truckdrivers, leadmen and non-exempt plant clerical employees employed by the Employer at its facility located at 27711 Diaz Street, Temecula, California; excluding salesmen, office clerical employees, guards, professional employees and supervisors as defined in the Act.

2. The certification

On October 3, 1980, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 21, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on March 18, 1981, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about March 30, 1981, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the ex-

² See *Modesti Brothers, Inc.*, 255 NLRB 828 (1981).

³ See *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

clusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about April 10, 1981, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since April 10, 1981, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Hudson Oxygen Therapy Sales Company, set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Hudson Oxygen Therapy Sales Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Sales Drivers and Dairy Employees, Local Union 166, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees including shipping and receiving employees, duplicators, inspectors, truckdrivers, leadmen and non-exempt plant clerical employees employed by the Employer at its facility located at 27711 Diaz Street, Temecula, California; excluding salesmen, office clerical employees, guards, professional employees and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since March 18, 1981, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about April 10, 1981, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Hudson Oxygen Therapy Sales Company, Temecula, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and

conditions of employment with Sales Drivers and Dairy Employees, Local Union 166, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive bargaining representative of its employees in the following appropriate unit:

All production and maintenance employees including shipping and receiving employees, duplicators, inspectors, truckdrivers, leadmen and non-exempt plant clerical employees employed by the Employer at its facility located at 27711 Diaz Street, Temecula, California; excluding salesmen, office clerical employees, guards, professional employees and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its 27711 Diaz Street, Temecula, California, facility copies of the attached notice marked "Appendix."⁴ Copies of said notice, on forms provided by the Regional Director for Region 21, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 21, in writing, within 20 days from the date of this

Order, what steps have been taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Sales Drivers and Dairy Employees, Local Union 166, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All production and maintenance employees including shipping and receiving employees, duplicators, inspectors, truckdrivers, leadmen and non-exempt plant clerical employees employed by us at our facility located at 27711 Diaz Street, Temecula, California; excluding salesmen, office clerical employees, guards, professional employees and supervisors as defined in the Act.

HUDSON OXYGEN THERAPY SALES
COMPANY

⁴ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."